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Supreme Court of the United States

No. 217.

OCTOBER TERM, 1936.

MIDLAND REALTY COMPANY, APPELLANT,

VS.

KANSAS CITY POWER & LIGHT COMPANY, APPELLEE.

APPELLANT'S PETITION FOR A REHEARING.

ELLIOTT H. JONES,
Counsel for Appellant.

SCARRITT, JONES & NORTH,
Of Counsel.

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VS.
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APPELLANT'S PETITION FOR A REHEARING.

Now comes appellant, Midland Realty Company, and respectfully petitions the court to grant a rehearing of the above-entitled cause for the reasons and upon the grounds as follows, to-wit:

(1) The court fell into error upon a crucial matter when, in its opinion, it said that "Under the challenged statute, defendant had opportunity to support the contract rates * * *" before the contract was, assertedly, abrogated. The fact is that appellant had no knowledge and no notice, actual or constructive, of the filing of the schedule of rates here in question, before August 1,

1917, the named effective date thereof, that is, before the contract was thereby effectually abrogated, according to the decision of the Missouri Supreme Court. Having no notice appellant had no opportunity to be heard concerning said schedule, as affecting its contract, prior to its asserted abrogation.

(2) The court overlooks in its opinion herein, an important proposition which was presented by appellant, to-wit, that the power of the state to abrogate a contract, such as we have here, is not an absolute one, and does not exist *per se*, and that such power arises only upon the condition that it is made to appear, in any particular instance, that public necessity or the public welfare requires the abrogation of the contract. It is indisputably true that, before or at the time this contract is said to have been abrogated, no public interest in nor public necessity for its abrogation was made to appear in anywise.

(3) The court is in error, we submit, in conceiving that appellant seeks to have this court refuse to accept the construction put upon the Missouri statute by the Missouri Supreme Court, in so far as that court was acting in its proper and exclusive sphere. The statute, as construed by the Missouri Supreme Court, is that which the appellant attacks on the ground that the statute, *as construed*, is repugnant to the Fourteenth Amendment to the Federal Constitution. The proper construction of the statute, as bearing upon the question as to whether or not it affords due process of law, is, assuredly, for the independent decision of this court.

Appellant begs to submit herewith some suggestions in support of this petition.

Respectfully submitted,

ELLIOTT H. JONES,
Counsel for Appellant.

SCARRITT, JONES & NORTH,
Of Counsel.

Certificate of Counsel.

I, the undersigned, being of counsel for appellant herein, do hereby certify that the above petition of appellant, for a rehearing, is not made for vexation or delay, but in good faith, and in the belief that the petition is meritorious.

ELLIOTT H. JONES,
Counsel for Appellant.

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING.

I.

In the court's opinion herein it is said that, "Under the challenged statute, defendant had opportunity to support the contract rates * * *." We interpret the court's opinion to mean that defendant may not say that it was deprived of its property (contract) without due process of law, since it was afforded an opportunity to be heard "in support" of the contract, before it was abrogated or taken away. It seems, therefore, that counsel for defendant may have been remiss in not pointing out to the court, with greater clarity and emphasis, that defendant had no such opportunity; that the statute did not afford to defendant the opportunity of a hearing "in support" of its contract, before it had been, according to the court, absolutely nullified.

It seems evident that this court was laboring under a grave misapprehension. The court must have conceived that defendant had notice of the schedule, in question, and of the filing thereof, before its contract had thereby been nullified, according to the holding of the Missouri Supreme Court. But, that is quite incorrect. The defendant had no knowledge or notice, actual or constructive, concerning said schedule before its named effective date, that is, before the abrogation of its contract, according to said court's decision, had been completely accomplished. Indeed, the gravamen of defend-

ant's appeal to this court is that the Missouri Supreme Court adjudged that its contract had been abrogated without notice and, therefore, without opportunity to be heard thereon. We thought, heretofore, that lack of notice was plain, and did not deem it necessary to stress the obvious. We, therefore, crave the earnest consideration of the court to the effort we now make to clarify this proposition.

II.

The decision of the Missouri Supreme Court was that, "we hold that the contract in controversy should be deemed nugatory from and after August 31, 1917" (Rec. 15). The court was referring to the named effective date of the schedule of rates which appellee filed, and "August 31" is, obviously, a misprint for "August 1." On that day, according to said court, defendant's contract became a nullity, and ceased to exist, and defendant had been effectually and completely deprived thereof. But, on and prior to that date defendant had not the slightest knowledge or notice, actual or constructive, of the filing of said schedule of rates.

The statute under which it is asserted that said schedule was filed (Paragraph 12 of Section 5190, Rev. Stat. of Mo., 1929) does not make the mere filing of a schedule constructive notice thereof to any utility *customer*. The statute provides neither for any actual notice being given to utility customers of the filing of a schedule of rates nor for any legal publication to serve as constructive notice. In short, the statute makes

neither requirement nor provision for notice to utility customers of the filing of a schedule of rates.

The contract here in question provides that defendant's "heating season," that is, the period during which it should be furnished steam, was from October 1st to May 31st (Rec. 50). So, the first steam heating service it received in the 1917-1918 "season" was in October, 1917. Plaintiff's said schedule, filed in June, named August 1, 1917, as its effective date, but it will be noted that plaintiff, in its petition (Rec. 25), makes no claim for steam service to defendant in August or September, 1917, the reason being, as stated, that defendant, under its contract, was not furnished steam service prior to October 1st. The petition states that defendant, for the October service, was billed on or about November 5, 1917 (Rec. 26). That was the first notice given to defendant of the filing of plaintiff's said schedule. But, at that time, the contract had passed out of the picture, had been absolutely nullified, according to the Missouri Supreme Court.

Even if it should be deemed, which seems to us impossible, that the onus would have been on defendant, if it had had notice of the schedule, to institute a proceeding or hearing in support of its contract, before the schedule had become "effective," it assuredly may not be asserted that such a burden was on defendant when it was without notice, actual or constructive, of the filing of said schedule. It must be conceded that, absent notice, opportunity of a hearing was also absent.

It is obvious, therefore, that the court was in error in saying that, "Under the challenged statute, defendant

had opportunity to support the contract rates * * *." It cannot, assuredly be said that the "challenged statute" afforded "opportunity" if, as is true, it afforded no notice.

III.

If it be suggested that it does not definitely appear in the record herein, that defendant did not have notice of said schedule, prior to its named effective date, the complete answer is that the burden was on *plaintiff* to show notice, if such there was. That there was the contract, and that it was a complete defense to this action, unless it had been legally nullified, is confessed. Therefore, to maintain its case, plaintiff had to show that the contract had been duly nullified, and had to affirmatively show that defendant had due notice, if notice was essential to its nullification. There is, assuredly, no presumption that defendant had notice of the schedule, prior to its named effective date. It is equally clear that there is no evidence that defendant had such notice. In any event, the statute does not provide for any notice, and the real issue here is, does a statute which permits one's contract to be abrogated, without notice, or which permits a person to be deprived of his property rights in a contract without notice and, therefore, without opportunity to be heard, comport with due process of law?

To state it somewhat differently, the proposition which we have endeavored to present is this. If the statute is such, as the Missouri Supreme Court holds, that this utility company was thereby authorized, and thereby delegated the power, first, to determine the public neces-

sity for the abrogation of its contract and, second, the power to itself, without the aid even of the commission, effect the abrogation of the contract and to deprive defendant of its property rights therein, by the mere doing of a voluntary act, without notice thereof to defendant, is not the statute repugnant to the 14th Amendment?

We submit that the provision of the statute, as construed by the Missouri Supreme Court, is, in substance, exactly as we have just stated it. We, therefore, now say, as we said in our brief herein for appellant (pp. 21, 22) that, "the very essence of due process of law is notice and a hearing. Both were conspicuously absent in the present instance. If said (Missouri) court has correctly construed said statute there can be no question, we submit, but that the statute undertakes to abrogate contracts, to take away property rights, without due process of law."

IV.

In addition to lack of notice, there is another reason why there was no opportunity for defendant to take action "to support" its contract. So long as plaintiff was furnishing steam service according to contract the defendant had no grievance to submit to commission or court, nor any relief to seek. If plaintiff had cut off the service, or had seriously threatened so to do, defendant might have sought relief, by mandatory injunction, from a court, but not from the commission. The latter has no judicial power. It could not have determined whether or not defendant had a contract or, if so, what its rights were thereunder, or whether it had been

abrogated, or was being breached. And, it is clear that defendant could not seek relief from a court, even, so long as the contract was being performed. There was no grievance, no controversy to submit, no relief to be sought. There was no provision in the Missouri law for a declaratory judgment concerning the contract. The Missouri Supreme Court recognizes such situation, in its opinion herein. It says, first, that "* * * the commission was without judicial power to determine finally defendant's rights under the contract," and, second, that "The usual process of the courts to determine the validity of the controverted schedules, was available to either party, although defendant was under no necessity to avail itself thereof, since the heat service was not shut off" (Rec. 13). The court should have said that defendant was "under no privilege," rather than "under no necessity" of going into court, "since the heat service was not cut off." Nothing less than a positive refusal by plaintiff to perform the contract would have justified, legally or practically, institution of any action by defendant in support of the contract. And, there is no evidence in the record here that plaintiff ever refused to perform the contract, or ever threatened, even, not to perform it. So, it is clear that no opportunity arose which required or legally permitted defendant to institute any action, "to support" its contract. As the pith of appellant's complaint is that it had neither notice nor opportunity to be heard before its contract was, assertedly, abrogated, and as this Honorable Court has, we believe, fallen into an error on that crucial matter, we

respectfully submit that the court should reconsider this case.

V.

The Missouri Supreme Court held that the contract became "nugatory from and after August 31 (1), 1917" (Rec. 15). Accordingly, when defendant was first given notice, in November, of the filing of said schedule, there was nothing it could do about its contract. It had been annulled and had ceased to exist, so the court held. In any event, to consider whether or not defendant could then have done anything "to support" its contract, held to have become defunct, would be but an academic discussion, in the case at bar. This suit was not instituted nor decided upon the theory that this contract expired on some date *after defendant received notice* of the filing of said schedule of rates, but upon the sole theory that the contract expired on August 1, 1917, regardless of notice to defendant. Plaintiff sought and was given judgment for the service rendered in October, before defendant had notice, as well as for succeeding months. The Missouri court gave no weight to the matter of notice. Indeed, its holding was, in effect at least, that no notice to defendant was necessary in order to effect the annulment of its contract by the mere act of appellee.

After defendant had notice of said schedule it might, possibly, have protested against the reasonableness of the schedule rates before the commission. But, as defendant had a contract, so it supposed, and the

same was being performed, it was not concerned with said schedule, or the reasonableness thereof to others. Furthermore, if defendant had protested against said schedule it could have obtained no better result than did the customers, without special contracts, who did protest it. They secured a decision of the commission that said schedule was unreasonable and unlawful (5 Mo. P. S. C. 664, 683). And, although that finding and decision of the commission became conclusive, in this collateral action, according to the statute (Sec. 5238, R. S. Mo., 1929), the courts refuse to give any heed to it. So, what could defendant have attained had it complained before the commission concerning said filed schedule, after it had notice thereof, and after its contract had become defunct, as the Missouri court holds?

VI.

It seems significant that in every instance, so far as we can discover, where the exact proposition here at issue has come before the courts, except in this Missouri case, the decision has been that the mere filing of a schedule of rates by a utility company, under statutes identical in substance with the Missouri statute, may not serve to abrogate a contract. We refer to the decisions in the state courts of Maine, Illinois and Kansas, and to the federal court decisions, cited on pages 17, 18 of the "Brief for Appellant" herein. It is well said by the court, in *Clancy* v. *Barker,* 131 Fed. 161, 169, that "The pregnant fact that no case can be found (in support of a certain proposition) is

the most complete demonstration that this was not the law."

We submit that there is no substance to the suggestion, if made, that the decisions cited are without weight because the Missouri court construed this statute differently from other courts, and that such construction is binding on this court. The only matter of substance in which the Missouri court and the other courts differ, in construing this statute, is that the Missouri court construes the statute as serving to abrogate a contract, in accordance with due process of law, while the other courts hold that it does not so serve. On that matter of construction this court is not bound by the decision of the Missouri court. Whether or not the statute may be properly construed as affording due process of law, as guaranteed by the Federal Constitution, is a question for the ultimate and independent decision of this court. The construction of the statute by the Missouri court, to the effect that the statute affords due process of law is not binding on this court. It is the statute, as construed by the Missouri court, which defendant attacks, on the ground that the statute, *as construed,* deprives it of its property without due process of law. We do not ask this court to overrule the Missouri Supreme Court's construction of the statute otherwise than upon the question of due process of law. We submit that the cases which we cite are influential, at least, on this proposition, the gist of those decisions being that to permit a utility company to abrogate its contract by its own voluntary act would not be in accordance with due process.

We respectfully ask that the court give particular attention to the well-considered case of *Attleboro Steam & El. Co.* v. *Narragansett El. L. Co.*, 295 Fed. 895 (R. I., 1924). The decision was delivered by the late Judge Arthur L. Brown, then district judge, but shortly thereafter promoted to circuit judge. There, as here, a utility company was asserting that the mere filing by it of a schedule of rates, under a Rhode Island statute very similar to this Missouri statute, served to abrogate a special contract it had with a customer. The grounds for denying the contention are stated by the court with great clarity and sound reasoning, and "fit like a glove" the case at bar. We quote from the opinion thus:

> "Before a contract can be interfered with under the police power, it *must appear* that the contract does in some manner affect adversely the *welfare of the public*. There is nothing in the records to show that the defendant brought to the notice of the commission any evidence that the company would be unable to perform its full duty to the community whose interest it is the function of the committee to protect. The plaintiff relies upon the contract. By answer, the defendant, as a justification for its demand for an increased rate, and for its threat to cut off the plaintiff's supply of electricity as a means of coercion to pay such increased rate, sets up its own action in filing an increased rate, and also the action of the Public Utilities Commission upon its request for a waiver of the statutory notice and for allowing the rate to become effective. * * * As the defendant has not invoked relief through the exercise of the power of the commission as a legislative agent to determine the question of the unreasonableness of the old rate, and the reasonableness of the new rate, but merely to relieve it from statutory requirements as to notice, its only defense is

its own act in increasing the rate. It has introduced no other justification than the consent of the commission to its request that it be made effective at once. It has failed therefore to show that the legislative power delegated to the commission in the public interest has ever been exercised in the interest of the public in any mode pointed out in the Public Utilities Act. The defendant is subject to public regulation *only to the extent of the public interest in its business.* * * * The defendant further contends that the mere filing of a new schedule is in itself a valid method of changing rates, and that, even if the allowance of the filing of the new rate by the commission in accordance with Section 48, did not amount to a finding as to the reasonableness of the rates, it yet waived the provision as to notice of changes, and permitted the defendant at an earlier time to exercise its own right to change a rate. *It seems evident, however, that the defendant cannot itself exercise the police power of the state to relieve it in the public interest from a burdensome contract. Nor can its own judgment be accepted by this court as a sufficient ground for disregarding the contract rights of the plaintiff. Rutland R. Lt. & Power Co.* v. *Burditt,* 94 Vt. 421, 422, 111 Atl. 582; *In re Searsport Water Co.,* 118 Me. 382, 393, 108 Atl. 452. The question of the reasonableness of what it has attempted to do, and whether the public interest is such as to override the obligation of its contract, involves an *administrative* question, which cannot be determined *by the defendant* or by this court. The statutory commission was created by the legislature to determine such questions, and the proper course is to obtain that judgment. *Legislative relief under reserved powers should be sought from the legislature's administrative agent, the Public Utilities Commission.* The result of proceedings before the commission fails to show that the defendant procured a finding of the commission that it was entitled to such relief, or that the commission, in allowing a new schedule to be

filed, added anything of force to the act of the defendant in filing of the rate. The practical effect of what was done is the same as if, after filing of the rate, the period of 30 days, fixed by Section 48 for notice, had elapsed without action by the commission. *The change therefore represents only the act of the defendant alone, and this is no ground for disregarding the contract right of plaintiff*" (italics ours).

VII.

We submit that undue influence is given by the court to the provisions of the statute which prohibit a utility company from deviating from a filed schedule of rates, and from thereby giving an "undue preference" to any customer. It would appear that such matters were eliminated, in this instance, by Section 87, Paragraph 4, of the statute, which provides that, "Nothing in this act shall be construed to prevent any (heating company) from continuing to furnish * * * service * * * at the rate or rates fixed in such contract or contracts." If, however, it be deemed that no effect should be given to that saving clause of the statute, it does not follow that appellee was at liberty to file said schedule and to then say that since it had filed that schedule, and was prohibited to deviate therefrom, it must disregard defendant's contract. Plaintiff was bound just as much by the law that it observe its contract, as it was by the law that it observe a filed schedule, even though the former law was not in a statute. Plaintiff was not required to file said schedule, and thus put itself in a position where it must breach one law to obey another. May it justify its breach of the law, which required it

to observe its contract, by voluntarily filing a schedule and then saying that the law required it to observe the schedule? That would be permitting plaintiff to gain an advantage by virtue of its own wrongdoing. Is it not clear that plaintiff's proper and only course, in keeping with all the law, would have been to have first obtained relief from this contract, if it was entitled thereto, by proper procedure before the commission, before it attempted to file a schedule which would be applicable to defendant? That was the course pursued by the utility company in the case of *State ex rel. Washington University* v. *Public S. C.*, 308 Mo. 328, and in other Missouri cases which plaintiff here relies upon. This case is here before this court because plaintiff failed to pursue said lawful course.

VIII.

Another proposition was, apparently, overlooked by the court, as it was not mentioned in the opinion herein. We believe that the court will deem the proposition to be quite important, now that the court understands that defendant had no notice of said filed schedule, prior to its named effective date. The principle has been thoroughly established by the decisions of this court that the legislative function to nullify contracts, such as we have here, is not an *independent* one, that it does not exist *per se,* and that such power arises only *upon the condition* that it is *made to appear* that the public necessity requires it, in any given instance. In the case of *Ark. Nat. Gas. Co.* v. *Ark. Rd. Comm.,* 261 U. S. 379, this court said:

> "* * * it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. *Indeed, the exertion of legislative power solely to that end is precluded by the contract impairment clause of the constitution.* The power does not exist *per se.* It is the intervention of the *public interest* which justifies, and at the same time, *conditions, its exercise*" (italics ours).

The decision of the Missouri Supreme Court was that the nullification of the contract in controversy was effected on August 1, 1917, by the mere filing of a schedule by plaintiff, in June. At that time no public necessity for, nor public interest in, the nullification of the contract was made to appear, by legislative finding or otherwise, unless it can be said that the filing of said schedule showed that it was the judgment of the *utility company* that the contract ought to be abrogated, in the public interest, and that *its judgment* was conclusive. Doubtless the legislature could have delegated to the Public Service Commission the power to make such a finding, after a proper hearing, but it is clear that the legislature could not delegate such power to the utility company (*Attleboro Steam & El. Co.* v. *Narragansett El. L. Co.*, 295 Fed. 895). We may infer from the opinions of the Missouri Supreme Court and of this court that it was deemed that the commission did, in 1919, make such a finding as to indicate that there was a public interest in the abrogation of this contract, in 1917, although this contract was not referred to in any manner in said decision of the commission (8 Mo. P. S. C. 223). Note that said decision was rendered long after

this contract had been performed, and had expired. For it is an indisputable fact that this contract was performed. Plaintiff may have reluctantly performed it, but it did, indeed, perform it. Is it not true that the utmost that can be said of the findings made by the commission, in 1919, is that the commission then indicated that this contract might well have been abrogated before it was completely performed, if its abrogation had been duly sought? It may be, as counsel for appellee contend, that a finding and decision of the commission, upon a hearing, is the same as the enactment of a law by the legislature. But, it is also true that the Missouri Constitution (Section 15, Art. II) forbids the enactment of a law "retroactive in its operation." It is clear, therefore, that the decision of the commission, in 1919, after this contract had been performed, could not operate retroactively so as to effect or so as to be the basis of, the abrogation of this contract, in 1917. It must, we submit, be confessed that no public interest in nor necessity for the abrogation of this contract was made to appear at the time it was said to have been abrogated, or before it was fully performed. But, the law, as established by this court, is that the power to abrogate a contract is *conditioned* upon it being made to appear that public necessity requires it. After the contract was performed, whether or not it ought, in the public interest, to have been performed, was at best, but a moot question. Furthermore, it is obvious that of appellee's vast business this small contract was a mere drop in the bucket. The contract was performed, at the con-

tract rate; and history has demonstrated that the public welfare was not thereby affected, in the least degree. It may be that plaintiff lost a little money in performing an improvident contract, but that is wholly immaterial, if it be true.

Respectfully submitted,

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